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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Ex parte appeal no.	88359361
Appellant	Layla Sleep, Inc.
Applied for mark	FLIPPABLE FIRMNESS
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Layla Sleep, Inc.,

Applicant.

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Application Serial No. 88359361
FLIPPABLE FIRMNESS

REPLY BRIEF

1. The Substitute Specimens Are Advertisements.

The substitute specimen is not a search result. It is a sponsored advertisement that is displayed above search results. The relevant consuming public, namely those purchasing mattresses from online retailers, understand how Google Ads work and would readily perceive the substitute specimen as an advertisement. There is no ambiguity with this. Furthermore, Google displays the word “Ad” next the advertisement. The Examiner also acknowledges that the substitute specimens are advertisements, referring to Applicant’s “Google Advertisements.” The cases cited by the Examiner relating to generic internet search results are not relevant as they relate to general search results. In this case, it is undisputed that the two substitute specimens are advertisements paid for and sponsored by Applicant.

2. The Advertisements Provide A Direct Association Between FLIPPABLE FIRMNESS and the Identified Services.

The substitute specimens provide a direct association between the applicant’s online retail store services featuring bed frames, mattresses, pillows, toppers, and bed sheets. The advertisement is a Google Ad Display. *See* Response 09/30/2001 at 10. The FLIPPABLE FIRMNESS mark is featured on the Ad Display. *Id.* If the user clicks on the Ad Display their web browser is directed to the Applicant’s website. *Id.* The Applicant is an online retailer of mattresses and associated products. *Id.* at 3-4. All this information was presented to the Examiner during prosecution. The Examiner has not submitted any evidence to the contrary. The Applicant submitted a declaration of its executive in connection with the Appeal. The purpose of the declaration is to provide background information and further context regarding significant use of the sponsored ads by the Applicant.

The ordinary consumer understands that if they click on the sponsored ad as shown in the specimen, their web browser will navigate to an online retail store featuring mattresses and other related bedding products. This is like a person walking through a retail mall and viewing different signs above each of the retail stores. That shopper understands that if they walk in the

retail space under that sign, they are walking into a retail store associated with the displayed sign. The e-shopper understands that if they click on the advertisement, they will be directed to the online retail store associated with that advertisement.

The Examiner argues for the first time in the reply brief that the term FLIPPABLE FIRMNESS is descriptive because it refers to a part of a queen mattress product. The Examiner further argues that because the house mark LAYLA is used on the advertisement, only that term can serve as a source identifier for the Applicant's online retail store services. The Applicant respectfully disagrees with this contention. The registrations of record are replete with examples wherein both a house mark and a secondary mark are registered for online retail store services. *See Appeal Brief at 12-14 (identifying eight examples).*

The term FLIPPABLE FIRMNESS is inherently distinctive. The Office acknowledged this when it issued the Notice of Allowance of this application in classes 020 and 035. Accordingly, the ordinary consumer cannot perceive the suggestive term as a feature of the product. Furthermore, the Applicant's identified services are for online retail stores featuring mattresses and other bedding related products. Therefore, it is reasonable to expect that the ordinary consumer presented with the inherently distinctive trademark and a picture of a mattress would understand that the advertisement is for an online retail store featuring mattresses and the inherently distinctive term is a source identifier for such services. There is nothing in the advertisement limiting the term FLIPPABLE FIRMNESS to mattresses. Instead, a potential consumer could logically conclude from the image of a mattress on a bed frame that the online retail store features a variety of bedding related products, including bed frames, foundations, mattresses, pillows, toppers, and bed sheets.

3. Any Doubt Should Be Resolved in Favor of the Applicant.

The TTAB should resolve any doubt regarding the specimen refusal in favor of the Applicant. *See Appeal Brief at 6-7 (citing TTAB cases).* The Examiner has not cited any case law or other standard to refute this point. Instead, the Examiner argues that the cases cited by

applicant discuss standards related to refusals that are not at issue in this matter and are not relevant.

The cited string of cases is from *In Re Int'l Christian Broadcasting*. See Serial No. 85058128, Appeal Decision (TTAB March 29, 2012) (not precedent). In that case, the Board held that “[t]o the extent that there is any doubt about whether purchasers would perceive the mark as shown in the specimens . . . as a service mark identifying the source of the retail store services, **as with many other grounds of refusal**, we think that such doubt should be resolved in favor of applicant.” *Id.* (emphasis added) (citing cases as set forth in Applicant’s Appeal Brief.) Accordingly, the Applicant submits that any doubt should be resolved in it’s a favor.

Respectfully submitted,
Layla Sleep, Inc.

February 9, 2022

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